

MEMORANDUM

Re: S. J. Res. 137 (P.L. 88-202 approved December 13, 1963, 77 Stat. 362), vesting subpoena power in the Presidential Commission investigating the assassination of President Kennedy -- asserted need for legislative purpose to sustain the grant of subpoena power, and proposal for legislative action to give the Commission a legislative purpose.

Congressman Louis C. Wyman, in a letter of December 10, 1963, to Congressman Ford, with copies to members of the Commission, expresses the fear that recalcitrant witnesses before the Commission may have a valid legal basis for refusing to answer questions, on the ground that S. J. Res. 137 as enacted fails to give the Commission a legislative purpose and therefore it may not constitutionally be authorized to use compulsory process. Congressman Wyman suggests that the Commission's investigative activity could be supplied with a legislative purpose by legislative action, such as that set forth in his resolution on the same subject, H. J. Res. 838, requiring the Commission to report to Congress the results of its investigations and its recommendations, if any, for legislation. Similar views by Congressman Wyman appear in the Congressional Record of December 10, 1963, in connection with House consideration of S. J. Res. 137. 109 Cong. Rec. 22787. Neither in his statement in the Congressional Record nor in his December 10th letter to Congressman Ford did Congressman Wyman cite court decisions or other legal authorities relied on to support the fears expressed by him about the validity of the grant of powers in S. J. Res. 137.

There appears to be little, if any, basis for the fears referred to above. While it is true that the courts have said that witnesses cannot be compelled to testify in investigations lacking a legislative purpose, 1/ this requirement

1/ See, for example, Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); Sinclair v. United States, 279 U.S. 263 (1929).

refers to investigations by congressional committees, not to inquiries conducted by agencies of the executive branch, which may be authorized to compel answers to questions in the discharge of their governmental functions even though their inquiries may not have a legislative purpose.

The investigations to be conducted by the present Commission are in aid of the discharge by the President of his governmental responsibilities. There seems little need for explanation or demonstration of this statement; obviously, any assassination of a President may, until investigation clarifies the matter, involve possible inefficiency in protective services, subversive activities, adjustments in the conduct of the office of the Presidency, or recommendations to the Congress for legislation. Moreover, there is a presumption of validity for official acts which negates any technical requirement to spell out the governmental purposes which the investigation will serve. This presumption reinforces the obvious nature of the governmental concerns here involved.

The Commission was established and its mandate was prescribed by the President (Executive Order No. 11130 of November 29, 1963, 28 F.R. 12789 of December 3, 1963), not by action of Congress or a House or committee thereof. However, the action of Congress in granting subpoena power to this Commission is tantamount to legislative ratification of its creation. In this respect, the present Commission is similar to the Presidential Commission created by President Roosevelt to investigate the Japanese attack on Pearl Harbor, the so-called Roberts Commission. 2/ The Roberts Commission was also created by Executive Order (No. 8983 of December 18, 1941, 6 Fed. Reg. 6569 of December 20, 1941) and it also received a grant of subpoena power from Congress to compel testimony, Public Law 370, approved December 23, 1941, 55 Stat. 853 -- legislation essentially similar to that just enacted here. The instructions of the Roberts Commission in the Executive Order were to report to the President, and neither the Executive Order nor the legislation conferring subpoena powers contained a requirement that the Commission report to Congress.

2/ The appointment by the President, without statutory authority, of presidential commissions to perform investigations of various matters has a long history. See Corwin, The President: Office and Powers (1957), pp. 71-72, 360-361, notes 7-10.

There are numerous examples of grants by Congress of the power to use compulsory process to obtain information, for investigations which are executive rather than legislative in purpose. See, for example, grants of such power to the Secretary of Agriculture in enforcing the Commodity Exchange Act (7 U.S.C. § 15), the perishable agricultural commodities laws (7 U.S.C. § 499m), the tobacco inspection laws (7 U.S.C. § 511n) and the Federal Seed Act (7 U.S.C. § 1603); the grants of such power to the Secretary of Health, Education, and Welfare in administering the federal social security benefits laws (42 U.S.C. § 405(d)), to the Secretary of the Treasury in enforcing the internal revenue laws (26 U.S.C. § 7602) and the narcotics laws (21 U.S.C. § 198a), to the Secretary of Labor in administering the Fair Labor Standards Act (29 U.S.C. § 209), to the Attorney General in administering the immigration laws (8 U.S.C. § 1225(a)), to the Administrator of Veterans' Affairs in carrying out the laws which he administers (38 U.S.C. § 3211), and to the Coast Guard in investigating marine casualties (46 U.S.C. 239(e)). The constitutionality of such grants of power has been upheld or necessarily assumed in numerous instances, e.g., Baltimore & Ohio R.R. v. I.C.C., 221 U.S. 612 (1911) (requirement by ICC of reports by carriers of employee working hours to enforce rail safety legislation held not repugnant to Fourth and Fifth Amendments); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) (subpoena of Secretary of Labor for investigation of alleged violations of Walsh-Healey Public Contracts Act held enforceable); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (investigation by Secretary of Labor to enforce Fair Labor Standards Act); Lewis v. National Labor Relations Board, 357 U.S. 10 (1958) (subpoena issued in unfair labor practice proceeding); St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) (order of Federal Trade Commission to submit various reports and materials for investigation of possible antitrust violations).

There are other examples of grants by Congress of the power to obtain information by compulsory process for law enforcement purposes, including particularly grants of such powers in aid of the enforcement of most of the various statutes whose administration is entrusted to independent regulatory agencies, but the grants cited above sufficiently indicate that such a grant may validly be made in aid of executive as well as legislative purposes.